DOCUMENT RESUME

ED 273 005 EA 018 739

AUTHOR Carter, David G., Sr.; And Others
TITLE Dynamic Gradualism: Much Motion but Little Progress.
PUB DATE 86
NOTE 11p.; In: Jones, Thomas N., Ed. and Semler, Darel P., Ed. School Law Update, 1986 (EA 018 725).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Viewpoints (120)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Court Litigation; *Desegregation Litigation; *Desegregation Methods; Educational Change; *Educational Policy; Elementary Secondary Education; *Equal Education; Futures (of Society); Poverty Areas; School Community Relationship; Student Needs
IDENTIFIERS Supreme Court

ABSTRACT

Thirty years after the "Brown v. Board of Education" decision, the United States has yet to adopt "all deliberate speed" in eliminating racial segregation, for courts have remained in protracted debate over desegregation in public schools. The legal concept of "intent" provides the distinction between "de jure" and "de facto" segregation, but a lack of guidelines has created problems for the North. Although progress has occurred in some areas, the situation has worsened in others; for example, the plight of low-income black children is worsening. The National Commission on Excellence in Education report draws attention to shortcomings of educational policies and to pervasive assumptions among Americans about minorities and education. Two local school projects have resulted in improvements--the School Improvement Project and Rising to Individual Scholastic Excellence. Cities that have successfully implemented such programs include New York City, Milwaukee, and Houston. Black and white high school graduates were equally likely to attend college in 1977; by 1982, 16 percent fewer blacks went on to college. As a result of changing demography, educators and the courts should no longer be willing to accept "busing of the status quo" as answers. Nontraditional instructional programs within each community should be developed, which build on the strength of existing faculty and staff. (CJH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

U.S. DEPARTMENT OF EDUCATION
(Office of Educational Research and Improvement)
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.
Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY
T. Jones
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

14

ED273005
EA 018 739

Dynamic Gradualism: Much Motion but Little Progress

David G. Carter, Sr.
J. John Harris III
Frank Brown

It is risky to speculate about the future in general and the direction of the courts specifically. Yet, because the authors believe that since the *Brown v. Board of Education II* decision the judicial and executive branches of government have relinquished the leadership necessary to address effectively an issue as pervasive as racial discrimination, we must look to the future and speculate.

Brown v. Board of Education I,[1] you will certainly recall, was the decision originally rendered that appeared to end once and for all racial segregation in the United States. But almost since the day it was handed down, legal scholars have been questioning its applications and narrowing its broad effect.[2] In retrospect, "One perhaps naive premise of the *Brown* decision was that racial [discrimination] could be eliminated through desegregation directed by the courts."[3]

To this day numerous questions attend the issues associated with racial segregation in public schools as a result of the judicial decisions since *Brown*, and one of these concerns is the distinction, or lack thereof, between de facto segregation (cause by actions other than those of school or governmental officials) and de jure segregation (caused by actual force of law). A pair of quick examples will illustrate the difference between de jure and de facto segregation. De jure segrégation can best be explained by the existence in the South of state statutes that prohibited blacks and whites from attending the same school regardless of where they lived. On the other hand, "de facto segregation...occurs when people separate into ethnically or racially similar groups and settle in distinct neighborhoods for a variety of extralegal reasons."[4] In the latter instance, the people do not congregate in racially defined groups in obedience to some law; rather, they congregate presumably as an expression of personal preference or predilection. "Northern school

1. 347 U.S. 483 (1954).

2. Hall & Henderson, *Thirty Years After Brown: Looking Ahead*, 24 Washburn L.J. 227 (1985).

3. Carter, *Desegregation: Futuristic Considerations*, School Desegregation: A Model at Work 97 106 (F. Aquila & J. Stoehr eds. 1978).

4. Carter, *De Facto-De Jure Segregation: A Questionable Distinction*, 8 NOLPE Sch. L.J. 18 (1978).

boards have traditionally contended that their segregated schools developed in precisely this neutral manner."[5] Where school districts were designed to be coterminous with neighborhood boundaries, there was no official segregation, and school officials had no legal duty to desegregate. Another concern with regard to racial segregation in public schools has centered on the extent to which subsequent court decisions have eroded the precepts upon which *Brown* is based.

Having examined several judicial decisions on this point, the authors believe that the courts have been, in general, blurring the distinction between de jure and de facto segregation. We contend that court decisions serve to signal whether access to equal educational opportunity is to become a reality for all Americans, and our research does not raise our hopes in this regard. Before discussing the future of desegregation in the United States, we turn to decisions in some of the cases that have specifically addressed de jure and de facto segregation.

Background

Beginning with the *Brown* decision in 1954 through 1974, the Supreme Court ruled on only desegregation cases in the South that involved "state statutes compelling or permitting segregation of public schools along racial lines."[6] "This judicial stance attacking de jure segregation exclusively was more acceptable to Northerners than the inhabitants of the South, especially since it operationalized the differences in the manner in which the courts were interpreting and applying the law."[7] During this period the Court held that while public school students had a constitutional right to avoid becoming the objects of discrimination, they did not have a constitutional right to attend or refrain from attending any particular school on the basis of racial considerations unless there had been overt discrimination against them.[8] This point of view was eventually rejected because of its "disregard for the reciprocal effects of zoning or building decisions and neighborhood school districting."[9]

Logic suggests that a school built in a predominantly black neighborhood will result in that community's becoming more racially isolated instead of less so. For this reason, it should have been anticipated that the courts would eventually rule on such a matter, which the Second Court of Appeals did in *Taylor v. Board of Education of New Rochelle*.[10] A large number of black students in New Rochelle had been assigned to

5. Bavry, *Intention as a Requirement for De Jure School Segregation*, Ohio St. L.J. 653.

6. Carter, *supra* note 4 at 180.

7. McCarthy, *New Directions in Desegregation Litigation*, School Desegregation: A Model at Work 74 (F. Aquila and J. Stoehr eds. 1974).

8. Bavry, *supra* note 5, at 654.

9. 924 F.2d 36 (2d Cir.), *aff'd*, 191 F. Supp. 181 (S.D.N.Y.), *cert. denied*, 368 U.S. 940 (1961).

10. 924 F.2d at 37.

one school. Although the board acknowledged certain school attendance boundaries, it permitted white students but not black students to transfer to other schools. In other words, it created de jure out of a de facto situation (or read it into it).

In *Bell v. School Board of Gary, Indiana*,[11] however, the court held that "there is no affirmative constitutional duty to change innocently arrived at school districts by the mere fact that shifts in population have increased or decreased the percentage of [black] or white pupils."[12] Because the ruling was contrary to the earlier decision rendered in *Taylor*, the distinction between de facto and de jure segregation, which appeared to be clear at the time of *Brown*, became less clear with the ruling in *Taylor*[13] and much less so after *Bell*. Thus, if the motives were free of racial taint, the courts found no duty to desegregate; the segregation remained de facto. If, however, segregation is racially motivated, the same duty arises in the North as in the South to desegregate. In Taylor's district, a finding of prosegregation motivations within the school board became the equivalent of a statute: both the board and its activity amounted to de jure segregation sufficient to raise an affirmative duty to desegregate. Under the *Taylor* standard, northern plaintiffs could not escape a duty to desegregate by merely pointing to the absence of a segregation statute.[14] Decisions like *Taylor* have, however, "resulted in two lines" of judicial reasoning.[15] But in numerous cases, the Supreme Court has held that the equal protection clause of the fourteenth amendment is not violated when racial segregation results from neutral factors as opposed to state action.[16] The criteria that have been used by the lower courts to determine this "neutrality" include (1) altruistic school board intentions;[17] (2) efforts to establish unitary school systems;[18] and (3) the fact that the school system "honestly and conscientiously constructed [its district] with no intention or purpose to segregate races."[19]

In *Jenkins v. Township of Morris School District*,[20] the Third Circuit Court of Appeals held that the commissioner of education for the state of New Jersey enjoyed broad powers to deal with de facto segregation ruling contrary to state policy. According to the court, the commissioner had an obligation to act if his failure to do so would result in increased

---

11. 213 F. Supp. 819 (1963), *aff'd*, 324 F.2d 209 (1963), *cert. denied*, 337 U.S. 924 (1964).
12. *Id.*
13. Bavry, *supra* note 5, at 656.
14. *Id.* at 656-657.
15. Abramson, *Constitutional Law – School Desegregation – Constitutional Duty to Desegregate De Facto Segregation*, 23 Emory L.J. 269 (Winter 1974).
16. *Id.*
17. Deal v. Board of Educ., 244 F. Supp. 572 (S.D. Ohio 1965), *aff'd*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967).
18. Bradley v. School Bd., 388 F.Supp. 67 (E.D. Va.), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973).
19. 213 F. Supp. *supra* note 11, at 819.
20. 279 A.2d 619 (N.J. 1971).

segregation. In *Husbands v. Pennsylvania*,[21] a 1973 case, the court held that although the Constitution may not require school officials to desegregate because of housing patterns, "where schools are not integrated, the separate but equal doctrine should be rigorously applied to ensure the equality of black student educational experience."[22]

The other line of judicial reasoning referred to earlier supports the view that, as a practical reality, all segregation arises out of governmental intervention and is, therefore, at least related to de jure segregation.

In *Keyes v. School District No. 1*,[23] the Supreme Court had an opportunity to address a case concerning segregation resulting from such neutral factors as preferred places of residence.[24] The primary difference between *Keyes* and the earlier cases was that school officials clearly did not sanction racial segregation, and remember that the legal concept called "intent" provides the distinction between de jure and de facto segregation.[25] At the time of the *Keyes* case, however, no guidelines existed for determining an "intent to segregate." The lack of a distinction created a particular problem for the North, where the desegregation cases "turned largely on the presence or absence of segregative intent."[26] *Austin*,[27] *Evans*,[28] *Dayton Board of Education*,[29] and *School District of Omaha*[30] are only a few of the cases where the courts failed to clarify the distinction between de jure and de facto segregation.

The authors consider Supreme Court Justice Powell prescient when he said that the distinction would probably outlive its time.[31] Accordingly, Powell believed that a continued reliance on the distinction could confute *stare decisis* and result in unpredictable litigation.[32] To this point the authors now turn.

Dynamic Gradualism

Whatever their reasons and motivations, the courts have remained in protracted debate over the elimination of segregation in public schools. While we can find some solace in the fact that cities like Los Angeles, Chicago, St. Louis, and Milwaukee, to name a few, actively pursue desegregation, it is more than ironic that thirty years after the *Brown*

---

21. 359 F. Supp. 924 (E.D. Pa. 1973).
22. *Id.*
23. 413 U.S. 189 (1973).
24. Goodman, *Constitutional Law – School Desegregation – De Facto Hangs on*, 52 N.S.L. Rev. 431 (1973).
25. *Id.*
26. Austin Indep. School Dist. v. United States, 97 S. Ct. 517 (1976), *vacated and remanded* United States v. Texas Educ. Agency, 532 F.2d 380 (1976).
27. 97 S. Ct. at 517.
28. Evans v. Buchanan, 393 F. Supp 428 (D. Del 1975), *aff'd*, 423 U.S. 963 (1975).
29. Dayton Bd. of Educ. v. Brinkman, 97 S. Ct. 2766 (1977).
30. United States v. School Dist. of Omaha, 389 F. Supp. 283 (D. Neb. 1974), 521 F.2d 530 (8th Cir.), 423 U.S. 946 (1975).
31. *Keyes*, 413 U.S. at 189, 236.
32. *Id.* at 235.

II[33] decision the United States has yet to adopt "all deliberate speed" in eliminating racial segregation. As Laughlin McDonald observed, "[a]ll deliberate speed," the term used in *Brown* II, "was never more than foot shuffling."[34] Desegregation has proceeded with relentless logic, "but it has not been with the logic of deliberate speed."[35] Though presented with numerous opportunities, the courts have been unable to reach the consensus view that regardless of the contributing factors, segregation is not in the best interest of the nation.

Moreover, some thirty-two years after *Brown* we find that the majority view is now in the minority (or soon will be), and that most public schools in most large cities remain just as segregated as if a law compelled it. Furthermore, in a number of these instances, the fleeing or scattered white population has dropped to less than 25 percent. Further still, black, white, and Hispanic students live in separate communities and give rise to even more refined segregation patterns, even where there is no significant difference in the economic levels of the families living in center city.

As we just suggested, whites over the years have relocated to suburbia, where few minorities live. Hence, the so-called doughnut effect, a form of segregation recognizable enough to have earned a nickname. Some educators would fight the doughnut effect with a system of metropolitan busing. This idea, too, has reached the Supreme Court, which addressed it in *Milliken*,[36] *Bradley*,[37] and *Indianapolis*.[38] While it may be salutary to continue pursuing the goal of metropolitan desegregation, the authors believe that de facto metropolitan desegregation, is just one manifestation of a systemic problem. The United States is at a crossroads and must reaffirm its commitment to the elimination of racial segregation in all public schools. Otherwise, the nation will suffer the profound diminution of the human resource potential that occurs whenever a large group of minority students is denied full academic opportunity.

Although progress has occurred in some areas, the situation has worsened in others. For instance, a study by the Children's Defense Fund indicates that the plight of low-income black children is deteriorating.[39] According to the report, twice as many black children as white die in their first year; three times as many are liable to be poor; four times as many are unlikely to live with either parent; and five times as many are liable to be on welfare. Relying on government statistics, the Children's Defense Fund report reveals a widening gap between black and white

33. 349 U.S. 753, 757 (1955).
34. McDonald, *The Song Has Ended but the Melody Lingers On*, 4 J. of L. & Educ. 29.
35. *Id.* at 32.
36. Milliken v. Bradley, 418 U.S. 717 (1974).
37. Bradley v. School Bd. of the City of Richmond, 338 F. Supp. 67, 104-105 (E.D. Va. 1972).
38. United States v. Bd. of School Comm'rs of Indianapolis, 332 F. Supp. 655 (S.D. Ind. 1971), *aff'd*, 474 F.2d 81 (7th Cir. 1973), *cert. denied*, 413 U.S. 920 (1973).
39. Children's Defense Fund, Black and White Children in America: Key Facts (1985).

children, and concludes that in recent years black children have been sliding backward, suffering increasingly from an inequality that denies them all sorts of opportunities, and especially educational opportunity.

The Future

The National Commission on Excellence in Education (NCEE) reports that approximately "13 percent of all 17-year-olds in the United States can be considered functionally illiterate (and that) functional illiteracy among minority youth may run as high as 40 percent." These statistics are troubling in light of the many court-ordered desegregation plans that adopt at least in part, the assumption that black achievement can be increased thereby. The NCEE report, in effect, draws attention not only to the shortcomings of current educational policies but also to the assumptions that pervade American society concerning minorities and education.

Governmental intervention predicated upon environmental theories of "cultural deprivation" and designed to modify educational inequality created by years of segregation, has lacked clear and definable guidelines, and has, therefore, enjoyed only limited success. Even the distinction between "segregation" and "racial imbalance" remains unclear. According to the United States Office of Education, "desegregation" to overcome "segregation" means "the assignment of children or faculty to public schools and within schools without regard to their membership in a minority group, but 'desegregation' does not mean the assignment of such persons to or within public schools in order to overcome racial imbalance."[40]

What statistical evidence one finds measuring the achievement of minority students attributable to desegregation suggests that, by itself, desegregation does not contribute in a major way to raising educational achievement levels in minority youth. Nancy St. John reviewed more than one hundred studies on the effects of desegregation on the educational achievement level of low-ability black students (studies purporting to measure for example how they have benefited or not benefited from prescribed plans to improve racial balance). She found that the benefits minority students derive from racially balanced schools are minimal to nonexistent.[41] St. John's work does not suggest that the high functional illiteracy rate among minority youth reflects inherent racial inferiority; no legitimate, scientific evidence suggests that racial or ethnic background relates in any way to intellectual capacity. There is some reason, however, to suspect the existence of a definite cultural bias toward curbing the achievement levels of minority students. John Stansfield believes that part of the problem may be an indifference among white capitalists to black educational opportunity. Stansfield

40. J. Harris, Brown to Buckley: A Study of Desegregation, Integration, and Student Attitudes in Seven Marion County, Indiana School Districts (1985).

41. St. John, School Desegregation: Outcomes for Children (1975).

suggests that the only real result of school desegregation has been to make blacks better labor market commodities, and he notes this attitude effectively keeps blacks from determining their own social and economic destinies.[42]

Harris and Bennett (1982) examined student discipline problems in two large urban desegregated school systems and found that a disproportionate number of male minority students had become the principal recipients of the schools' disciplinary mechanisms.[43] Much of the dissatisfaction found among minority students reflected a variable Harris and Bennett refer to as "fatalism," or a lack of personal control over the environment.[44] Other studies suggest that this lack of control, which effectively discourages achievement and amounts to a new form of discrimination, is characteristic of today's desegregated schools.

Where, then, does one turn for help? Statistical analyses of desegregation, using various indices of the relationships among desegregation, achievement, and district demography have so far failed to reduce these relationships to a single index.[45] Indeed, the courts have failed to mandate any equality of achievement guidelines.[46] Nor have we yet found education authorities agreeing on what kind of instruction promotes equality of achievement.[47]

Some observers, however, suggest that giving students a stake in the future of their own schools may encourage closer integration as students of all races work to achieve common goals. It can certainly lessen the sense of "fatalism" that pervades the hallways of schools today. These examples include the schools developed under the leadership of the late Ronald Edmonds, Professor of Education at Michigan State University. Edmonds identified five characteristics of schools that have effectively taught poor and disadvantaged youth: (1) leadership, (2) widespread knowledge of a school's purpose, (3) a safe and orderly climate, (4) high teacher expectation and (5) close monitoring with standardized tests.[48] "None of these characteristics encourages poor and disadvantaged children to think they have made satisfactory progress when they are not even close to mastery."[49] All five character-

---

42. Stansfield, *Urban Public School Desegregation and White Domination*, 48 The Educ. Digest 34.

43. Harris & Bennett, Student Discipline: Legal, Empirical, and Educational Perspectives (1982).

44. Bennett & Harris, *Suspensions and Expulsions of Male and Black Students*, 16 Urban Educ. 419.

45. Dziuban & Ester, *Some Relationship Among Indices of School Desegregation*, 20 Am. Educ. Research J. 120.

46. Fields & Harris, *Educational Malpractice and the Public's Demand for Accountability*, 8 Planning and Changing 10.

47. J. Harris, *supra* note 40, at 5.

48. Harris & Carter, Effective Desegregated Schools and Academic Excellence (National Institution of Education, 1983).

49. Eubanks & Lesine, *A First Look at Effective School Projects in New York and Milwaukee*, 64 Phi Delta Kappan 697 (1983).

istics are important in a system where many of the students transfer from one school to another during the course of a single year. Edmonds also called for the establishment of a mastery achievement level for all students and nonpromotion for those who fail to attain it.[50]

In 1978, Edmonds put his ideas to work in a group of New York City schools. His work became known as the School Improvement Project (or SIP). Edmonds introduced uniform curriculum to combat the effects on achievement of a high rate of pupil mobility. He raised requirements for high school graduation, and changed the promotion policy to require the demonstration of a minimum academic mastery. He then established alternative classes for those who did not demonstrate mastery.

However positive such efforts at changing school expectations for students may seem, self-image improvement can have an impact on student achievement levels as great as, or greater than, government programs that spring from some transitory political interest in excellence in education.

In their report on Edmond's SIP, Clark and McCarthy found that from 1979 to 1982, the scores of SIP schools were higher than those of citywide schools.[51] For example, they found the reading level of 15 SIP schools increased 6.3 percent from the spring of 1980 to the spring of 1981; for other city schools the reading level increased by only 3.8 percent.[52]

After a quarter-century of litigation, the Houston public schools successfully desegregated without sacrificing academic excellence by establishing sixty-one magnet schools. Houston's Vanguard Program for the academically gifted begins in elementary school and continues through high school. Students are required to enroll in academic subjects, and receive extended instructional time to participate in parts of special mathematics and science programs. But magnet schools serve not only the gifted, but all other levels of educational ability as well.

In July of 1980, the Magnet School Task Force, 150 community and educational leaders, reviewed the entire concept for eight months. Its consensus was that the program had brought high-quality, integrated education to Houston. Enrollment and the length of waiting lists to enter the program have since continued to increase.[53] Moreover, the Tucson Unified School District has enjoyed similar success with its magnet school program.[54]

Milwaukee has also undertaken to achieve academic excellence in twenty of its urban schools that serve predominantly low-income and

---

50. *On School Improvement: A Conversation with Ronald Edmonds*, 40 Educ. Leadership 13.

51. Clark & McCarthy, *School Improvement in New York City: The Evaluation of a Project*, 12 Educ. Researcher 17.

52. *Id.* at 22.

53. McIntire, Hughes & Say, *Houston's Successful Desegregation Plan*, 63 Phi Delta Kappan 536 (1982).

54. *Id.*

minority students. RISE (Rising to Individual Scholastic Excellence) is based on these eight goals:

(1) the cultivation of the pervasive belief that all students can learn and that school is primarily responsible for their learning;
(2) the development of a strong sense of academic mission;
(3) the cultivation of a high level of professional collegiality among staff members;
(4) the establishment of a strong sense of student identification with the school;
(5) grade-level expectations and standards in the areas of reading, mathematics, and language;
(6) The use of an accelerated learning program for students performing well below grade level;
(7) an increase in the amount of time allocated, and actually used, for active student learning; and
(8) the establishment of a structured learning environment.[55]

As in SIP, the eighteen RISE schools have shown tremendous improvements: dramatic in mathematics and somewhat improved in reading. Eubanks and Levine (1983) evaluated both SIP and RISE, and reached conclusions similar to those reported by Clark and McCarthy.

Black and white high school graduates were equally likely to attend college in 1977. By 1982, 16 percent fewer blacks went on to college. The reason, according to the study, was poverty, pure and simple. Today the illiteracy rate for black Americans is approximately 44 percent. An examination of the public school dropout rate suggests that if achievement were measured by truancy, adolescent pregnancies, and dropout statistics, our schools would be a huge success. On the other hand, if one applies the traditional, generally agreed upon measures of success, one would have no choice but to consider education a failure.

Continued inaction and indecisiveness can only help increase the number of blacks who now question whether the desegregation of elementary and secondary schools has occurred or is even necessary. Thus, to "assume that mixing black and white children in schools and classrooms [will] magically provide quality education,"[56] is, in the current environment, unrealistic. As a result of changing demography, educators and the courts should no longer be willing to accept busing of the status quo as answers. They must resolve to do something that has not yet been done: develop nontraditional instructional programs within each community that build on the strength of the existing faculty and staff. The authors are convinced that if integration is to emerge from mere desegregation, our entire educational approach must be changed.

---

55. McCormack-Larkan & Kritek, *Milwaukee's Project RISE*, 40 Educ. Leadership 16.
56. Watson, *School Integration: Its Meaning, Costs and Future*, 4 J.L. & Educ. 15 (Jan. 1975).

Conclusion

What remains to be done is not more of the same but something wholly different. Despite dozens of judicial decisions, many complex issues remain to be resolved before educational equity becomes a reality for all. Yet the once-fervent mood of the country has cooled and hardened, and there is both disenchantment and ambivalence toward the more compassionate judicial rulings, school board policies, and practices of school district personnel.

The current mood of the country raises questions about whether the goal of ending racial segregation in public schools can even be reached through judicial intervention alone. The underlying factors that help nurture and reinforce segregation are still at work. If the future is to be better than the past, educators and judicial officials must focus their attention on strategies that encourage students to succeed academically in the segregated communities where they live. Also, approaches beyond busing must be examined and reexamined. Otherwise, the country will continue to make a lot of motion but little progress toward the elimination of racial segregation in public schools, and dynamic gradualism will continue to be the reality.